vate label brands is far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories." 319 F. Supp. 1031, 1043 (1970).

The court held that Topco's practices were pro-competitive and, therefore, consistent with the purposes of the antitrust laws. But we conclude that the District Court used an improper analysis in reaching its result.

III

On its face, § 1 of the Sherman Act appears to bar any combination of entrepreneurs so long as it is "in restraint of trade." Theoretically, all manufacturers, distributors, merchants, sellers, and buyers could be considered as potential competitors of each other. Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it. *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918) (Brandeis, J.). The history underlying the formulation of the antitrust laws led this Court to conclude, however, that Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition. In lieu of the narrowest possible reading of § 1, the Court adopted a "rule of reason" analysis for determining

assertion by Topco is that they are wholly inconsistent with the notion that territorial divisions are crucial to the existence of Topco, as urged by the association and found by the District Court. From the filing of its answer to the argument before this Court, Topco has maintained that without a guarantee of an exclusive territory, prospective licensees would not join Topco and present licensees would leave the association. It is difficult to understand how Topco can make this argument and simultaneously urge that territorial restrictions are an unimportant factor in the decision of a member on whether to expand its business.

whether most business combinations or contracts violate the prohibitions of the Sherman Act. *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911). An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. *Chicago Board of Trade* v. *United States, supra,* at 238.

While the Court has utilized the "rule of reason" in evaluating the legality of most restraints alleged to be violative of the Sherman Act, it has also developed the doctrine that certain business relationships are *per se* violations of the Act without regard to a consideration of their reasonableness. In *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5 (1958), Mr. Justice Black explained the appropriateness of, and the need for, *per se* rules:

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."

It is only after considerable experience with certain business relationships that courts classify them as *per se*

violations of the Sherman Act. See generally Van Cise, The Future of Per Se in Antitrust Law, 50 Va. L. Rev. 1165 (1964). One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, *e. g.*, manufacturers and distributors, which are termed "vertical" restraints. This Court has reiterated time and time again that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963). Such limitations are *per se* violations of the Sherman Act. See *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211 (1899), aff'g 85 F. 271 (CA6 1898) (Taft, J.); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951); *Northern Pacific R. Co.* v. *United States*, *supra*; *Citizen Publishing Co.* v. *United States*, 394 U. S. 131 (1969); *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967); *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 390 (1967) (STEWART, J., concurring in part and dissenting in part); *Serta Associates, Inc.* v. *United States*, 393 U. S. 534 (1969), aff'g 296 F. Supp. 1121, 1128 (ND Ill. 1968).

We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation of § 1. The District Court failed to make any determination as to whether there were *per se* horizontal territorial restraints in this case and simply applied a rule of reason in reaching its conclusions that the restraints were not illegal. See, *e. g.*, Comment, Horizontal Territorial Restraints and the Per Se Rule, 28 Wash. & Lee L. Rev. 457, 469 (1971). In so doing, the District Court erred.

United States v. *Sealy, Inc.*, *supra*, is, in fact, on all fours with this case. Sealy licensed manufacturers of mattresses and bedding to make and sell products using the Sealy trademark. Like Topco, Sealy was a corporation owned almost entirely by its licensees, who elected the Board of Directors and controlled the business. Just as in this case, Sealy agreed with the licensees not to license other manufacturers or sellers to sell Sealy brand products in a designated territory in exchange for the promise of the licensee who sold in that territory not to expand its sales beyond the area demarcated by Sealy. The Court held that this was a horizontal territorial restraint, which was *per se* violative of the Sherman Act.[9]

Whether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us. The fact is that courts are of limited utility in examining difficult economic problems.[10] Our inability to weigh, in any mean-

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[9] It is true that in *Sealy* the Court dealt with price fixing as well as territorial restrictions. To the extent that *Sealy* casts doubt on whether horizontal territorial limitations, unaccompanied by price fixing, are *per se* violations of the Sherman Act, we remove that doubt today.

[10] There has been much recent commentary on the wisdom of *per se* rules. See, *e. g.*, Comment, Horizontal Territorial Restraints and the Per Se Rule, 28 Wash. & Lee L. Rev. 457 (1971); Averill, Sealy, Schwinn and Sherman One: An Analysis and Prognosis, 15 N. Y. L. F. 39 (1969); Note, Selected Antitrust Problems of the Franchisor: Exclusive Arrangements, Territorial Restrictions, and Franchise Termination, 22 U. Fla. L. Rev. 260, 286 (1969); Sadd, Antitrust Symposium: Territorial and Customer Restrictions After *Sealy* and *Schwinn*, 38 U. Cin. L. Rev. 249, 252-253 (1969); Bork, The Rule of Reason and the Per Se Concept, pt. 1, Price Fixing and Market Division, 74 Yale L. J. 775 (1965).

Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this

ingful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.

In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition. *E. g., United States* v. *General Motors Corp.*, 384 U. S. 127, 146–147 (1966); *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942); *Fashion Originators' Guild* v. *FTC*, 312 U. S. 457 (1941).

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy. Cf. *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 371 (1963).

The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But, the fallacy in this is that Topco has no authority under the Sherman Act to determine the

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area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.

respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products. Without territorial restrictions, Topco members may indeed "[cut] each other's throats." Cf. *White Motor Co.*, *supra*, at 278 (Clark, J., dissenting). But, we have never found this possibility sufficient to warrant condoning horizontal restraints of trade.

The Court has previously noted with respect to price fixing, another *per se* violation of the Sherman Act, that:

> "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed." *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397 (1927).

A similar observation can be made with regard to territorial limitations. *White Motor Co.*, *supra*, at 265 n. 2 (BRENNAN, J., concurring).

There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to

bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

Just as the territorial restrictions on retailing Topco-brand products must fall, so must the territorial restrictions on wholesaling. The considerations are the same, and the Sherman Act requires identical results.

We also strike down Topco's other restrictions on the right of its members to wholesale goods. These restrictions amount to regulation of the customers to whom members of Topco may sell Topco-brand goods. Like territorial restrictions, limitations on customers are intended to limit intra-brand competition and to promote inter-brand competition. For the reasons previously discussed, the arena in which Topco members compete must be left to their unfettered choice absent a contrary congressional determination. *United States* v. *General Motors Corp., supra;* cf. *United States* v. *Arnold, Schwinn & Co., supra; United States* v. *Masonite Corp., supra; United States* v. *Trenton Potteries, supra.* See also, *White Motor Co., supra,* at 281–283 (Clark, J., dissenting).

We reverse the judgment of the District Court and remand the case for entry of an appropriate decree.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring in the result.

The conclusion the Court reaches has its anomalous aspects for surely, as the District Court's findings make clear, today's decision in the Government's favor will tend to stultify Topco members' competition with the great and larger chains. The bigs, therefore, should find it easier to get bigger and, as a consequence, reality

seems at odds with the public interest. The *per se* rule, however, now appears to be so firmly established by the Court that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation.

MR. CHIEF JUSTICE BURGER, dissenting.

This case does not involve restraints on interbrand competition or an allocation of markets by an association with monopoly or near-monopoly control of the sources of supply of one or more varieties of staple goods. Rather, we have here an agreement among several small grocery chains to join in a cooperative endeavor which, in my view, has an unquestionably lawful principal purpose; in pursuit of that purpose they have mutually agreed to certain minimal ancillary restraints that are fully reasonable in view of the principal purpose and that have never before today been held by this Court to be *per se* violations of the Sherman Act.

In joining in this cooperative endeavor, these small chains did not agree to the restraints here at issue in order to make it possible for them to exploit an already established line of products through noncompetitive pricing. There was no such thing as a Topco line of products until this cooperative was formed. The restraints to which the cooperative's members have agreed deal only with the marketing of the products in the Topco line, and the only function of those restraints is to permit each member chain to establish, within its own geographical area and through its own local advertising and marketing efforts, a local consumer awareness of the trademarked family of products as that member's "private label" line. The goal sought was the enhancement of the individual members' abilities to compete, albeit to a modest degree, with the large national chains which had been successfully marketing private-label lines for

several years. The sole reason for a cooperative endeavor was to make economically feasible such things as quality control, large quantity purchases at bulk prices, the development of attractively printed labels, and the ability to offer a number of different lines of trademarked products. All these things, of course, are feasible for the large national chains operating individually, but they are beyond the reach of the small operators proceeding alone.[1]

After a careful review of the economic considerations bearing upon this case, the District Court determined that "the relief which the government here seeks would not increase competition in Topco private-label brands"; on the contrary, such relief "would substantially diminish competition in the supermarket field." 319 F. Supp. 1031, 1043. This Court has not today determined, on the basis of an examination of the underlying economic realities, that the District Court's conclusions are incorrect. Rather, the majority holds that the District Court had no business examining Topco's practices under the "rule of reason"; it should not have sought to determine whether Topco's practices did in fact restrain trade or commerce within the meaning of § 1 of the Sherman Act; it should have found no more than that those practices involve a "horizontal division of markets" and are, by that very fact, *per se* violations of the Act.

I do not believe that our prior decisions justify the result reached by the majority. Nor do I believe that a new *per se* rule should be established in disposing of this case, for the judicial convenience and ready pre-

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[1] The District Court's findings of fact include the following:

"33. A competitively effective private label program to be independently undertaken by a single retailer or chain would require an annual sales volume of $250 million or more and in order to achieve optimum efficiency, the volume required would probably have to be twice that amount." 319 F. Supp. 1031, 1036.

dictability that are made possible by *per se* rules are not such overriding considerations in antitrust law as to justify their promulgation without careful prior consideration of the relevant economic realities in the light of the basic policy and goals of the Sherman Act.

I

I deal first with the cases upon which the majority relies in stating that "[t]his Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963)." *White Motor*, of course, laid down no *per se* rule; nor were any horizontal territorial limitations involved in that case. Indeed, it was in *White Motor* that this Court reversed the District Court's holding that vertically imposed territorial limitations were *per se* violations, explaining that "[w]e need to know more than we do about the actual impact of these arrangements on competition to decide whether they . . . should be classified as *per se* violations of the Sherman Act." 372 U. S., at 263. The statement from the *White Motor* opinion quoted by the majority today was made without citation of authority and was apparently intended primarily to make clear that the facts then before the Court were not to be confused with horizontally imposed territorial limitations. To treat dictum in that case as controlling here would, of course, be unjustified.

Having quoted this dictum from *White Motor*, the Court then cites eight cases for the proposition that horizontal territorial limitations are *per se* violations of the Sherman Act. One of these cases, *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1 (1958), dealt exclusively with a prohibited tying arrangement and is improperly cited as a case concerned with a division of

markets.[2] Of the remaining seven cases, four involved an aggregation of trade restraints that included price-fixing agreements. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951); *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967);[3] *Serta Associates, Inc.* v. *United States*, 393 U. S. 534 (1969), aff'g 296 F. Supp. 1121 (ND Ill. 1968). Price fixing is, of course, not a factor in the instant case.

Another of the cases relied upon by the Court, *United States* v. *National Lead Co.*, 332 U. S. 319 (1947), involved a world-wide arrangement[4] for dividing territo-

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[2] There is dictum in the case to the effect that *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), aff'd, 175 U. S. 211 (1899), established a "division of markets" as unlawful in and of itself. 356 U. S., at 5. As I will show, however, *Addyston Pipe* established no such thing; it was primarily a price-fixing case.

[3] I cannot agree with the Court's description of *Sealy* as being "on all fours with this case." *Ante*, at 609. *Sealy* does support the proposition that the restraints on the Topco licensees are horizontally imposed. Beyond that, however, *Sealy* is hardly controlling here. The territorial restrictions in *Sealy* were found by this Court to be so intimately a part of an unlawful price-fixing and policing scheme that the two arrangements fell together:

"[T]his unlawful resale price-fixing activity refutes appellee's claim that the territorial restraints were mere incidents of a lawful program of trademark licensing. Cf. *Timken Roller Bearing Co.* v. *United States*, [341 U. S. 593 (1951)]. The territorial restraints were a part of the unlawful price-fixing and policing." 388 U. S., at 356.

[4] In summarizing its findings, the District Court made the following statements:

"When the story is seen as a whole, there is no blinking the fact that there is no free commerce in titanium. Every pound of it is trammelled by privately imposed regulation. The channels of this commerce have not been formed by the winds and currents of competition. They are, in large measure, artificial canals privately constructed. . . .

". . . No titanium pigments enter the United States except with the consent of NL [defendant National Lead]. No foreign titanium

ries, pooling patents, and exchanging technological information. The arrangement was found illegal by the District Court without any reliance on a *per se* rule;[5] this Court, in affirming, was concerned almost exclusively with the remedies ordered by the District Court and made no attempt to declare a *per se* rule to govern the merits of the case.

In still another case on which the majority relies, *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), the District Court had, indeed, held that the agreements between the manufacturer and certain of its distributors, providing the latter with exclusive territories, were horizontal in nature and that they were, as such, *per se* violations of the Act. 237 F. Supp. 323, 342–343. Since no appeal was taken from this part of the District Court's order,[6] that issue was not before this Court in its review of the case. Indeed, in dealing with the issues that were before it, this Court followed an approach markedly different from that of the District Court. First, in reviewing the case here, the Court made it clear that it was proceeding under the "rule of

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pigments move in interstate commerce except with like approval. No titanium pigment produced by NL may leave the ports of the United States for points outside the Western Hemisphere." 63 F. Supp. 513, 521–522.

[5] The District Court clearly decided the case under the "rule of reason." It found that there was "a combination and conspiracy in restraint of trade; and the restraint is *unreasonable*. As such it is outlawed by Section 1 of the Sherman Act." 63 F. Supp., at 523 (emphasis added). The court rejected the argument made by the defense that the basic agreement on which the arrangement was founded was permissible under "the doctrine which validates covenants in restraint of trade when reasonably ancillary to a lawful principal purpose . . . . [T]he world-wide territorial allocation was *unreasonable in scope when measured against the business actualities.*" *Id.*, at 524 (emphasis added).

[6] "The appellees did not appeal from the findings and order invalidating [territorial] restraints on resale by distributors . . . ." 388 U. S., at 368.

reason," and not by *per se* rule;[7] second, the Court saw the issues presented as involving vertical, not horizontal, restraints.[8] It can hardly be contended, therefore, that this Court's decision in *Schwinn* is controlling precedent for the application in the instant case of a *per se* rule that prohibits horizontal restraints without regard to their market effects.

Finally, there remains the eighth of the cases relied upon by the Court—actually, the first in its list of "authorities" for the purported *per se* rule. Circuit Judge (later Chief Justice) Taft's opinion for the court in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), aff'd, 175 U. S. 211 (1899), has generally been recognized—and properly so—as a fully authoritative exposition of antitrust law. But neither he, nor this Court in affirming, made any pretense of establishing a *per se* rule against all agreements involving horizontal territorial limitations. The defendants in that case were manufacturers and vendors of cast-iron pipe who had "entered into a combination to raise the prices for pipe" throughout a number of States "constituting considerably more than three-quarters of the territory of the United States, and significantly called . . . 'pay territory.'" 85 F., at 291. The associated defendants in

[7] "The Government does not contend that a *per se* violation of the Sherman Act is presented by the practices which are involved in this appeal . . . . Accordingly, we are remitted to an appraisal of the market impact of these practices.

". . . [W]e must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry." 388 U. S., at 373-374.

[8] "We are here confronted with challenged vertical restrictions as to territory and dealers. . . . These are not horizontal restraints, in which the actors are distributors with or without the manufacturer's participation." 388 U. S., at 372.

combination controlled two-thirds of the manufactured output of such pipe in this "pay territory"; certain cities ("reserved" cities) within the territory were assigned to particular individual defendants who sold pipe in those cities at prices fixed by the association, the other defendants submitting fictitious bids and the selling defendants paying a fixed "bonus" to the association for each sale. Outside the "reserved" cities, all sales by the defendants to customers in the "pay territory" were, again, at prices determined by the association and were allocated to the association member who offered, in a secret auction, to pay the largest "bonus" to the association itself. The effect was, of course, that the buying public lost all benefit of competitive pricing. Although the case has frequently—and quite properly—been cited as a horizontal allocation-of-markets case, the sole purpose of the secret customer allocations was to enable the members of the association to fix prices charged to the public at noncompetitive levels. Judge Taft rejected the defendants' argument that the prices actually charged were "reasonable"; he held that it was sufficient for a finding of a Sherman Act violation that the combination and agreement of the defendants gave them such monopoly power that they, rather than market forces, fixed the prices of all cast-iron pipe in three-fourths of the Nation's territory. The case unquestionably laid important groundwork for the subsequent establishment of the *per se* rule against price fixing. It did not, however, establish that a horizontal division of markets is, without more, a *per se* violation of the Sherman Act.

II

The foregoing analysis of the cases relied upon by the majority indicates to me that the Court is not merely following prior holdings; on the contrary, it is estab-

lishing a new *per se* rule. In the face of the District Court's well supported findings that the effects of such a rule in this case will be adverse to the public welfare,* the Court lays down that rule without regard to the impact that the condemned practices may have on competition. In doing so, the Court virtually invites Congress to undertake to determine that impact. *Ante*, at 611–612. I question whether the Court is fulfilling the role assigned to it under the statute when it declines to make this determination; in any event, if the Court is unwilling on this record to assess the economic impact, it surely should not proceed to make a new rule to govern the economic activity. *White Motor Co.* v. *United States*, 372 U. S., at 263.

When one of his versions of the proposed Act was before the Senate for consideration in 1890, Senator Sherman, in a lengthy, and obviously carefully prepared, address to that body, said that the bill sought

> "only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at

* Among the facts found by the District Court are the following: private label brand merchandising, which is beyond the reach of the small chains acting independently and which by definition depends upon local exclusivity, permits the merchandiser to offer the public "lower consumer prices on products of high quality" and "to bargain more favorably with national brand manufacturers"; such merchandising fosters "the establishment of a broader supply base of manufacturers, thereby decreasing dependence upon a relatively few, large national brand manufacturers"; it also enables "[s]maller manufacturers, the most common source of private label products, who are generally unable to develop national brand name recognition for their products, [to] benefit . . . by the assurance of a substantial market for their products . . . ." 319 F. Supp., at 1035.

by this bill, and not the lawful and useful combination.

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"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . ." 21 Cong. Rec. 2457, 2460.

In "carry[ing] out the meaning of the law" by making its "determin[ations] in each particular case," this Court early concluded that it was *Congress' intent that a "rule of reason"* be applied in making such case-by-case determinations. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 60 (1911). And that rule of reason was to be applied in light of the Act's policy to protect the "public interests." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179 (1911). The *per se* rules that have been developed are similarly directed to the protection of the public welfare; they are complementary to, and in no way inconsistent with, the rule of reason. The principal advantages that flow from their use are, first, that enforcement and predictability are enhanced and, second, that unnecessary judicial investigation is avoided in those cases where practices falling within the scope of such rules are found. As the Court explained in *Northern Pacific R. Co.* v. *United States, supra,* at 5,

"[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

In formulating a new *per se* rule today, the Court does not tell us what "pernicious effect on competition" the practices here outlawed are perceived to have; nor does it attempt to show that those practices "lack . . . any redeeming virtue." Rather, it emphasizes only the importance of predictability, asserting that "courts are of limited utility in examining difficult economic problems" and have not yet been left free by Congress to "ramble through the wilds of economic theory in order to maintain a flexible approach." [10]

With all respect, I believe that there are two basic fallacies in the Court's approach here. First, while I would not characterize our role under the Sherman Act as one of "rambl[ing] through the wilds," it is indeed one that requires our [illegible] economic problems." We can undoubtedly ease our task, but we should not abdicate t hat role by formulation of *per se* rules with no justificati on other than the enhancement of predictability and th e reduction of judicial investigation. Second, from th e general proposition that *per se* rules play a necessary r ole in antitrust law, it does not follow that the particula r *per se* rule promulgated today is an appropriate one. Although it might well be desirable in a proper case for this Court to formulate a *per se* rule dealing with horizo ntal territorial limitations, it would not necessarily be ap propriate for such a rule to amount to a blanket prohibiti on against all such limitations. More specifically, it is far from clear to me why such a rule should cover thos e division-of-market agreements which involve no price fixing and which are con-

[10] It seems ironical to me that in another antitrust case decided today, *Ford Motor Co.* v. *United St ates*, *ante*, p. 562, the Court, in contrast to its handling of the insta nt case, goes out of its way to commend another District Court fo r its treatment of a problem involving "predictions and assumptions concerning future economic and business events."

cerned only with trademarked products that are not in a monopoly or near-monopoly position with respect to competing brands. The instant case presents such an agreement; I would not decide it upon the basis of a *per se* rule.[11]

The District Court specifically found that the horizontal restraints involved here tend positively to promote competition in the supermarket field and to produce lower costs for the consumer. The Court seems implicitly to accept this determination, but says that the Sherman Act does not give Topco the authority to determine for itself "whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products." *Ante*, at 611. But the majority overlooks a further specific determination of the District Court, namely, that the invalidation of the restraints here at issue "would not increase competition in Topco private label brands." 319 F. Supp., at 1043. Indeed, the District Court seemed to believe that it would, on the contrary, lead to the likely demise of those brands in time. And the evidence before the District Court would appear to justify that conclusion.

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[11] The national chains market their own private-label products, and these products are available nowhere else than in the stores of those chains. The stores of any one chain, of course, do not engage in price competition with each other with respect to their chain's private-label brands, and no serious suggestion could be made that the Sherman Act requires otherwise. I fail to see any difference whatsoever in the economic effect of the Topco arrangement for the marketing of Topco-brand products and the methods used by the national chains in marketing their private-label brands. True, the Topco arrangement involves a "combination," while each of the national chains is a single integrated corporation. The controlling consideration, however, should be that in neither case is the policy of the Sherman Act offended, for the practices in both cases work to the benefit, and not to the detriment, of the consuming public.

There is no national demand for Topco brands, nor has there ever been any national advertising of those brands. It would be impracticable for Topco, with its limited financial resources, to convert itself into a national brand distributor in competition with distributors of existing national brands. Furthermore, without the right to grant exclusive licenses, it could not attract and hold new members as replacements for those of its present members who, following the pattern of the past, eventually grow sufficiently in size to be able to leave the cooperative organization and develop their own individual private-label brands. Moreover, Topco's present members, once today's decision has had its full impact over the course of time, will have no more reason to promote Topco products through local advertising and merchandising efforts than they will have such reason to promote any other generally available brands.

The issue presented by the antitrust cases reaching this Court are rarely simple to resolve under the rule of reason; they do indeed frequently require us to make difficult economic determinations. We should not for that reason alone, however, be overly zealous in formulating new *per se* rules, for an excess of zeal in that regard is both contrary to the policy of the Sherman Act and detrimental to the welfare of consumers generally. Indeed, the economic effect of the new rule laid down by the Court today seems clear: unless Congress intervenes, grocery staples marketed under private-label brands with their lower consumer prices will soon be available only to those who patronize the large national chains.